United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1124 **September Term, 2017**

FILED ON: JUNE 8, 2018

MATSON TERMINALS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 17-1148

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*, and HENDERSON and GRIFFITH, *Circuit Judges*.

J U D G M E N T

These cases were considered on a petition for review and cross-application for enforcement of a Decision and Order of the National Labor Relations Board ("Board") and briefed and argued by counsel. *See Matson Terminals, Inc.*, 365 N.L.R.B. No. 56, 2017 WL 1330298 (Apr. 7, 2017). The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petition for review be denied and the cross-application for enforcement be granted for the reasons stated below.

Petitioner Matson Terminals, Inc. ("Matson") transports goods between the West Coast of the United States and Hawaii. Much of the work done in Hawaii involves the loading and unloading of Matson's barges. Seven of Matson's employees ("Employees") plan and monitor the company's day-to-day operations in Hawaii. They oversee the twenty-six longshoremen and eight wharf clerks (collectively, "laborers") who perform the manual labor of loading and unloading cargo.

The Hawaii Teamsters & Allied Workers Union, Local 996 ("Union") filed an election petition with the Board to represent the Employees. Matson opposed the petition, arguing that the Employees are "supervisors" who do not have the right to organize under the National Labor

Relations Act (NLRA). *See* 29 U.S.C. § 152(3). Specifically, the NLRA does not provide collective-bargaining rights to any "supervisor," that is, "any individual having authority, in the interest of the employer, to . . . assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances," provided that "the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." *Id.* § 152(11).

The Board's Regional Director found that Matson had not proven the Employees were supervisors under the NLRA. Shortly thereafter, the Employees unanimously voted for the Union to represent them, and the Regional Director certified the Union as the Employees' collective-bargaining representative. Matson requested review from the Board, which was denied. The Union then requested to bargain with Matson, but the company refused. The Board's General Counsel issued a complaint, alleging that Matson's refusal to bargain violated Section 8(a)(1) and (5) of the NLRA. Matson maintained that its refusal was lawful because the Employees were supervisors under the NLRA. The General Counsel then filed a motion for summary judgment with the Board. The Board granted the General Counsel's motion.

Matson petitions for review of the Board's order granting summary judgment, challenging the Board's earlier finding that the Employees are not supervisors under the NLRA. Matson bears the burden of demonstrating supervisory status, *see NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711-12 (2001), and can satisfy that burden only with specific examples drawn from the record, *see Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). We afford the Board significant deference when it comes to determining supervisory status, *see Passaic Daily News v. NLRB*, 736 F.2d 1543, 1550 (D.C. Cir. 1984), and will sustain the Board's determination unless it is "contrary to law, inadequately reasoned, or unsupported by substantial evidence," *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 276 (D.C. Cir. 2001).

Matson argues the Employees are supervisors because they are authorized to exercise independent judgment when engaged in at least one of the following: (1) assigning laborers, (2) rewarding laborers, (3) disciplining laborers, (4) responsibly directing laborers, or (5) adjusting laborers' grievances. *See* 29 U.S.C. § 152(11). The Board found otherwise, and we conclude that substantial evidence supports that conclusion.

Assigning Laborers: A supervisor "assigns" an employee when the supervisor designates the employee to a place, appoints the employee to a time, or gives the employee "significant overall duties." *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 689-90 (2006). Assignments do not occur when giving an employee an "ad hoc instruction [to] perform a discrete task." *Id.* at 689. Nor does one employee assign another when "choosing the order in which the employee will perform discrete tasks within [their] assignments." *Id.* The Employees prepare plans that show where containers should be loaded on a barge or the order in which containers should be removed from a barge. Individual laborers satisfy these plans when the Employee supervising the barge operations directs them to perform discrete tasks. The plan itself does not specify what any individual laborer must do to satisfy the plan. Therefore, the Employees do not "assign" any particular laborer when creating the barge plans. Furthermore, when the Employees schedule

laborers to each operation, substantial evidence shows that they base those assignments exclusively on work opportunity, as required by the laborers' collective-bargaining agreement. This scheduling process does not require the independent judgment necessary to trigger supervisory status.

Rewarding Laborers: Matson argues that the Board erred because the Employees reward laborers in two ways: (1) "tacking on" or "padding" laborers' hours whenever certain conditions are met, and (2) rewarding laborers by permitting them to leave work early or for short periods during the work day on paid time. The evidence before the Board demanded neither of these conclusions. The Board faced conflicting evidence of whether the Employees actually tacked on time. Three witnesses testified to the existence of the practice, but the Board refused to credit that testimony because those witnesses were not Employees at the time of the hearing. Meanwhile, the only then-Employee to address the issue disclaimed any authority to tack on time and testified that he never engaged in such a practice. The Board traditionally prioritizes the testimony of those witnesses who occupy the alleged supervisory role at the time of the hearing. *See Avante at Wilson, Inc.*, 348 N.L.R.B. 1056, 1057-58 (2006). We conclude that this practice is reasonable. Substantial evidence therefore supports the Board's conclusion that the Employees are not authorized to tack on time. As for leave requests, substantial evidence supports the Board's conclusion that the Employees do not exercise independent judgment when granting those requests. The record discloses no specific example in which an Employee denied a laborer's request to leave early or in the middle of a shift. Substantial evidence instead supports the Board's conclusion that the Employees granted leave as a routine matter.

Disciplining Laborers: The Employees have authority to issue incident reports, including those that report violations of Matson's policies. But even assuming that these incident reports show that the Employees are authorized to impose discipline, Matson produces no record evidence rebutting the Board's conclusion that the Employees are not authorized to do so with independent judgment. Both incident reports in the record involved laborers' unauthorized absences—obvious violations of Matson's policies. An employee who reports flagrant violations of company policy does not exercise independent judgment sufficient to establish supervisory status. *See Jochims v. NLRB*, 480 F.3d 1161, 1171-72 (D.C. Cir. 2007) (collecting cases). Even though Matson claims that the Employees had discretion not to report these types of incidents, the company fails to cite any record evidence of an occasion on which an Employee learned of a laborer leaving the workplace without permission and nevertheless declined to prepare a report.

Responsibly Directing Laborers: A supervisor engages in "direction" if he "has men under him" and "decides what job shall be undertaken next or who shall do it." *Oakwood*, 348 N.L.R.B. at 691. That direction is taken "responsibly" only if two conditions are met. First, the supervisor must have "authority to take corrective action, if necessary" to ensure the direction is followed. *Id.* at 692. Second, the supervisor must be held "accountable" for an employee's performance, such that the supervisor is subject to some "adverse consequence" if the tasks are performed improperly. *Id.* at 691-92. Matson focuses its efforts on showing that the Employees face adverse consequences for the laborers' failures. However, Matson ignores the other half of the *Oakwood* test—the need to show that the Employees have authority to take corrective action. Because Matson presents no

record evidence showing that the Employees had such corrective authority, we sustain the Board's determination.

Adjusting Laborers' Grievances: Substantial evidence also supports the Board's conclusion that the Employees do not exercise independent judgment when adjusting laborers' grievances. Matson appeals to the Employees' authority to adjust the pay of laborers who are accidently dispatched to lower-hour jobs than they should have received under their collective-bargaining agreement with Matson. Even assuming that these corrections adjust laborers' grievances, Matson offers no reason to think that they require independent judgment. *See Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1080 (10th Cir. 2005) (maintaining that "corrections of mere mistakes when an employee calls attention to them" do not require independent judgment (quoting *NLRB v. Sheet Metal Workers Int'l Ass'n, Local 104*, 64 F.3d 465, 469 (9th Cir. 1995))). Because Matson produces no evidence demonstrating that the Employees' corrections are anything other than routine, we sustain the Board's finding.

Finally, Matson argues that we should consider the ratio of non-supervisor employees to supervisors and determine that the Board's decision creates an implausible scenario in which all supervisory authority over forty-one employees (the seven Employees and the thirty-four laborers) is vested exclusively in a single terminal manager. We have no jurisdiction to consider this argument because Matson first raised the argument in its opposition to the General Counsel's motion for summary judgment in the unfair-labor-practice proceeding. The NLRA provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). And a party cannot urge an objection before the Board under § 160(e) unless it does so "in the time and manner that the Board's regulations require." *Spectrum Health—Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). The Board has long required an employer who contests a union's certification to raise in the representation proceedings any arguments that can be litigated there, rather than waiting to raise them during the related unfair-labor-practice proceeding. *See Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008). And, as the Board observed, "[a]ll representation issues raised by [Matson] were or could have been litigated in the prior representation proceeding." *Matson Terminals, Inc.*, 2017 WL 1330298, at *1. We lack jurisdiction to consider Matson's argument because Matson failed to raise it in the underlying representation proceeding.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition

for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk